THOMAS IRUTHAYAM & ANOR *a*

v.

LSSC DEVELOPMENT SDN BHD

HIGH COURT MALAYA, SHAH ALAM *b*
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT(2) 1-24-942-1998]
10 MARCH 2005

CONTRACT: *Building contract - Breach - Failure by defendant to deliver vacant possession of property to purchasers - Whether time of essence of agreement - Whether plaintiffs had right of rescission - Whether plaintiffs entitled to refund and damages - Contracts Act 1950, s. 56 - Specific Relief Act 1950, s. 34* *c*

LAND LAW: *Housing developers - Sale and purchase agreement - Non-delivery of vacant possession - Whether time of essence of agreement - Whether plaintiffs had right of rescission - Whether plaintiffs entitled to refund and damages - Contracts Act 1950, s. 56 - Specific Relief Act 1950, s. 34* *d*

A sale and purchase agreement ('the S&P') of a certain house was executed between the plaintiffs and the defendant, the developers of the relevant housing project, on 19 June 1996. It was one of the conditions of the S&P that the handing over of the house was to occur on 18 June 1998 *ie*, within 24 months from the date of the agreement. The relevant clause in the agreement was cl. 7, which covered the issue of delivery of vacant possession. On 27 May 1998, the plaintiffs received a notice regarding the forwarding of the keys for the said property, which they accepted. By 30 May 1998, the plaintiffs supplied the list of complaints or defects to the defendant in a pre-prepared form and on 21 July 1998, they sent a letter of rescission of the S&P to the defendant, by invoking cl. 12(b) of the agreement – which contained the remedies available to the purchaser in the event of default by the vendor – on the basis of the infringement of cl. 7 by the defendant. *e* *f* *g*

The plaintiffs contended that the defendant had failed to deliver vacant possession of the property, due to its failure to connect the water and the electricity and also deliver the certificate of fitness for occupation by 18 June 1998. The defendant, however, argued that since the deposits for the water and electricity supply had been late in coming, and if time had been of the essence of the agreement, it thus had been waived. On 29 August 1998, the plaintiffs filed an originating summons praying for a declaration that the defendant had breached the S&P and that the plaintiffs had rightfully rescinded *h* *i*

that agreement on 21 July 1998, or in the alternative, a declaration that the said agreement was rescinded by reason of breach of the contract by the defendant. The plaintiffs also sought liquidated damages, a refund of the consideration sum of RM306,000, incidental charges of RM2,980 and other damages.

Held (for the plaintiffs):

[1] The defendant's argument was a measure of the defendant's desperation to extricate itself from the contract as the deposits had been paid more than a month earlier *ie*, before the delivery date. It must also be understood that the supply of amenities *viz* the flow of water and electricity was not the responsibility of the defendant, but the connection of the water and electricity mains were. In this instance, the plaintiffs had managed to successfully convince the court that the defendant had failed to deliver vacant possession as the water and electricity mains had yet to be connected, and the certificate of fitness never handed over to them. In fact, the defendant had even failed to establish that it had submitted an application for that certificate. On the totality of the evidence, this court was satisfied that when the plaintiffs and the defendant had executed the S&P in 1996, time was indeed intended to be of the essence of the agreement. (p 148 b-e)

[2] On the facts, by virtue of cl. 12(b) of the S&P, the plaintiffs were allowed the right of rescission, if they so wished, in the event of any failure by the defendant to deliver vacant possession. Even if the agreement did not provide for rescission, by virtue of s. 56 of the Contracts Act 1950, the contract became voidable at the option of the plaintiffs as the defendant had failed to deliver vacant possession by 18 June 1998 (within 24 months from the date of execution of the contract), bearing in mind that time was of the essence in the contract. Even to date, the defendant had not made any attempts to physically deliver that certificate of fitness to the plaintiffs, so as to rectify the delay in its completion of the contract. With that attitude prevailing and the written contract rendered voidable, the plaintiffs were thus statutorily entitled to rescind the contract, as provided for by s. 34 of the Specific Relief Act 1950. Once the plaintiffs handed the letter of rescission, the contract became void and ceased to be enforceable. (pp 149 e, 150 a-c, f-h & 151 a-b)

[3] Factually, by the time vacant possession of the house was due, the plaintiffs had already paid up everything that was required to be paid in accordance with the S&P. Since the defendant had breached the agreement and the plaintiffs had rightfully rescinded the agreement, the defendant would have to return the sum of RM306,000 together with the interest from the date of the filing of the originating summons. Both parties would thus be returned to their respective pre-agreement positions as neither one would be permitted to profit from any unconscionable enrichment. The plaintiffs were also to be deregistered as the registered owners of the impugned property on full and final settlement of the adjudged sum. (p 151 c-f)

[Ordered accordingly.]

Case(s) referred to:
Aberfoyle Plantations v. Cheng [1960] AC 115 ***(refd)***
Brutus v. Cozen [1973] AC 854 ***(refd)***
City Investment Sdn Bhd v. Koperasi Serbaguna Cuepecs Tanggungan Bhd [1988] 1 MLJ 69 ***(refd)***
Commonwealth Smelting Ltd v. Guardian Royal Exchange Assurance Ltd [1986] 1 Lloyd's Rep 121 ***(refd)***
Cowles v. Gate [1871] LR 7 Ch App 12 ***(refd)***
Fisher v. Winch [1939] 1 KB 666 ***(refd)***
Hare v. Nicoll [1966] 2 QB 130 ***(refd)***
Hill v. Evans [1862] 4 De G F & J 288 ***(refd)***
Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 FC ***(refd)***
Lock v. Bell [1930] Ch 35 ***(refd)***
Loh Wai Lian v. SEA Housing Corp Sdn Bhd [1987] 2 MLJ 1 ***(refd)***
Re Schwabacher [1908] 98 LT 127 ***(refd)***
Salmah Sulaiman & Anor v. Metroplex Development Sdn Bhd [1997] 2 CLJ 148 CA ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 ***(refd)***
Syarikat Lean Hup (Liew Bros) Sdn Bhd v. Cheow Choong Thai [1988] 3 MLJ 221 ***(refd)***
Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ 666 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(i), 56
Specific Relief Act 1950, s. 34

Other source(s) referred to:
Wu Min Aun & Beatrix Vohrah, *The Commercial Law of Malaysia*, pp 30, 90

For the plaintiff - En Joseph; M/s Joseph Iruthayam & Co
For the defendant - En A Onn; M/s Onn & Partners

Reported by Suresh Nathan

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JUDGMENT

Suriyadi Halim Omar J:

The plaintiffs were purchasers (interchangeably referred to as plaintiffs or purchasers) of a house known as Lot RS 106 Phase 1A, at Bandar Country Homes, Rawang for RM306,000 from the defendant, who were the developers of the relevant housing project. A sale and purchase agreement was executed between them on 19 June 1996. It was one of the conditions of that S&P that handing over of the house was to occur on 18 June 1998 ie, within 24 months from the date of the agreement. The relevant clause ie, cl. 7 and their sub-clauses, which cover the issue of delivery of vacant possession, read as follows:

> 7.1 Vacant possession of the said building together with the certificate of fitness for occupation issued by the appropriate authority and with water and electricity supply connected thereto shall be handed over to the purchaser (s) within twenty four (24) months from the date of this agreement; and
>
> 7.2 Upon expiry of fourteen (14) days from the date of a notice from the vendor (s) requesting the purchaser (s) to take possession of the said property, whether or not the purchaser (s) has actually entered into possession or occupation of the said property, the purchaser (s) shall be deemed to have taken delivery of vacant possession.
>
> 7.3 If the vendor (s) fails to hand over vacant possession of the said building in the manner aforesaid, the vendor (s) shall immediately pay to the purchaser (s) liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

The other relevant provisions are cls. 12 (b) and 18 (h). They respectively read:

> 12(b) In the event of a failure and/or default by the vendor (s) to complete the sale of the said property and to deliver vacant possession of the same to the purchaser (s) in accordance with the terms herein, the purchaser (s) shall, without prejudice to the other provisions of this agreement or any other rights and remedies as may be available to the purchaser (s) at law or in equity, be entitled to take such action as may be available to the purchaser (s) at law for specific performance of the terms and conditions herein and the vendor (s) shall reimburse all cost and expenses incurred by the purchaser (s) (including but without limitation the purchaser (s) solicitors' cost on a solicitor-client basis) ...
>
> 18(h) Time whenever mentioned shall be of the essence of this agreement.

b c d e f g h i

On 27 May 1998 the plaintiffs had received a notice as regards the forwarding of the keys for the said property, and of which were accepted by them (TI5). By 30 May 1998 the plaintiffs had supplied the list of complaints or defects to the defendant in a pre-prepared form (TI5). Sometime on 21 July 1998 the plaintiff purchasers, through their solicitor Messrs. Joseph Iruthayam & Co had sent a letter of rescission of the S&P contract to the defendant, by invoking cl. 12 (b) of the agreement (supplied above), on the basis of the infringement of the above cl. 7 by the defendant.

In a gist the plaintiffs had stated that the defendant had failed to deliver vacant possession of the property, due to its failure to connect the water and the electricity and the delivery of the certificate of fitness for occupation, by 18 June 1998. In no uncertain terms the plaintiffs had insisted that even until today the defendant had yet to deliver that certificate of fitness. That fact of non-delivery was further confirmed when counsel for the defendant had admitted that the certificate of fitness had been handed over, but unfortunately to the solicitors of the plaintiff's lending bank. That bank, let alone its solicitors certainly have no nexus or privity of contract with the defendant. To make matters worse this irrelevant admission was also made from the bar table. On that premise I thus must accept the assertion of the plaintiffs as an established fact that up to-date they have yet to receive that certificate.

On 29 August 1998, the plaintiffs had filed an originating summons, praying amongst others, a declaration that the defendant had breached the impugned S&P and that the plaintiffs had rightfully rescinded that agreement on 21 July 1998, or in the alternative praying for a declaration that the said agreement was rescinded by reason of breach of the contract by the defendant. Further the plaintiffs had sought liquidated damages, a refund of the consideration sum of RM306,000, incidental charges of RM2,980 and other damages.

Having perused the evidence, with particular reference to cl. 7(2) of the S&P, I was satisfied that with fourteen (14) days having expired from the date of the notice sent by the defendant requesting the purchasers to take possession of the said property, whereupon the keys were handed to them, they were deemed to have taken delivery of vacant possession of that property. Despite that stance it is trite that a deeming provision, of which cl. 7.2 is the playing field, may be rebutted by an aggrieved party. For purposes of clarification and analogy, in *Fisher v. Winch* [1939] 1 KB 666 Goddard LJ at 674 had occasion to remark:

> ... is very often decisive where there is no evidence at all as to what the boundaries are, **but like any other presumption it is rebuttable,** and very often it can be easily rebutted by the production of title deeds (emphasis added).

As opposed to that provision, cl. 7.1 deals with a factual situation whereat vacant possession shall have been delivered, if all the preconditions have been complied with. As the water and electricity supply were yet to be connected, let alone a certificate of fitness delivered, the deemed delivery of vacant possession had certainly been rebutted. Without that conditional vacant possession being satisfied by the defendant within 24 months from the date of execution of the S&P, particularly as time was of the essence of the agreement, the defendant was certainly in for a rough time in court.

Although the ascertainment of the meaning of a written contract, in this case the current S&P, is a question of law, the many steps in the process of ascertaining that meaning are question of facts. The meaning of an ordinary word of the English language is not a question of law as compared to the proper construction of a statute being a question of law (*Brutus v. Cozen* [1973] AC 854; *Commonwealth Smelting Ltd v. Guardian Royal Exchange Assurance Ltd* [1986] 1 Lloyd's Rep. 121). In *Hill v. Evans* [1862] 4 De G.F & J 288, the approach of deciphering an ordinary word to be a question of fact, even extended to technical terms. That being so the ascertainment of the meaning of the term "time" here falls squarely within the purview of 'question of fact'. This issue of construction will be pieced together with the issues in the following paragraphs.

It is well established that where a conditional contract fixes a date, by which date the condition must be fulfilled, that date so fixed must be strictly adhered to. Despite that statement, I am not unmindful of the prevalence of cases which establish that time is not of the essence in a contract of sale and purchase of real estate, unlike contracts for the sale of shares (*Hare v. Nicoll* [1966] 2 QB 130). In *Re Schwabacher* [1908] 98 LT 127 Parker J aptly had opined:

> With regard to contracts for the sale of shares, I think that time is of the essence both at law and in equity. Shares continually vary in price from day to day, and that is precisely why courts of equity have considered such a contract to be one in which time is of the essence of the contract, and not like a contract **for the sale and purchase of real estate, in which time is not of the essence of the contract** (emphasis added).

Contrary to that view, there are also precedents in the like of *Cowles v. Gate* [1871] LR 7 Ch App 12, which had dealt with the sale of a public house as a going concern, and had held a different view. Generally time was held to be the essence of the relevant contract if provided for there (see also *Lock v. Bell* [1930] Ch 35). Lord Jenkins later in *Aberfoyle Plantations v. Cheng* [1960] AC 115 had summarised the law in this manner:

> ... their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following principles: (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) ... (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

Salleh Abas FJ in *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363, in clear terms had also stated that in modern law of contract, time was not of the essence of a contract, unless parties had agreed that it be so. For purposes of this case, cl. 18(h) here in all its simplicity had recorded without any reservation that time whenever mentioned, shall be the essence of the agreement. Read together with all the above cases, it is safe to conclude that if an agreement states that where a conditional contract of sale has fixed the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to. It is also quite safe to add that, in certain situations even if the time factor were not sufficiently clarified, it might be quite reasonable to conclude that where the subject matter of the contract is liable to fluctuate in value, in the like of selling of shares and scripts, time would be regarded as being of the essence of the contract (*The Interpretation of Contracts* by Kim Lewison, Barrister).

As regards the facts of this case, it must be understood that way back in 1996, when the value of houses would spiral upwards wildly, until the world saw a swing to uncertainty and recession from 1997 onwards, the intention of parties when executing the S&P must be taken into consideration. At that time too when times were good, aside from genuine purchasers who had wanted to buy matrimonial homes at reasonable prices, there were also enterprising entrepreneurs who had bought and sold houses as if they were transacting shares in the stock exchange. In other words time was very important for those types of speedy transactions.

Returning to current times, it was vehemently asserted by the plaintiffs that even until now vacant possession had yet to be delivered to the plaintiffs by the defendants. Surely there was something terribly wrong if the claim of the plaintiffs could be defeated, despite the long wait, merely because the contracted matter was a real estate?

The defendant had attempted to convince me that as the deposits for the water and electricity supply had been late in coming, and if time had been of the essence of the agreement, it thus had been waived. This was nit-picking and a measure of the defendant's desperation to extricate itself from the contract, as the deposits had been paid more than a month earlier ie, before the delivery date. It must also be understood that the supply of amenities *viz.* the flow of water and electricity was not the responsibility of the defendant, but the connection of the water and electricity mains were (*Salmah bte Sulaiman & Anor v. Metroplex Development Sdn Bhd* [1997] 2 CLJ 148; *Syarikat Lean Hup (Liew Bros) Sdn Bhd v. Cheow Choong Thai* [1988] 3 MLJ 221) 1 AMR 592). Here the plaintiffs had managed to successfully convince me that, come the delivery date the defendant had failed to deliver vacant possession as the water and electricity mains had yet to be connected and the certificate of fitness never handed over to them. In fact the defendant even had failed to establish that they had submitted an application for that certificate *(Syarikat Lean Hup (Liew Bros) Sdn Bhd v. Cheow Choong Thai (supra)).*

On the totality of the evidence, I was satisfied that in 1996 when the S&P was executed by the plaintiffs and the defendant, time was indeed intended to be of the essence of the agreement.

With the defendant having breached the contract here, the plaintiffs were automatically accorded the rights to still enforce the agreement by demanding specific performance of it pursuant to cl. 12(b), and demand damages in the process as agreed upon. Regretfully the plaintiffs had taken the extreme course of action of rescinding the agreement. The pertinent questions that invariably follow, which had to be resolved emanating from that scenario could be formulated in the following forms:

1. did the S&P, in particular cl. 12(b) provide for the right of rescission of the contract by the plaintiffs in the event of a failure and/or default by the vendor defendant to complete the sale of the said property and deliver vacant possession of the same to them;

2. even if the agreement did not provide for rescission could the plaintiffs have invoked any written law or equity to rescind that contract in the event of a voidable contract or a fundamental breach having been committed by the defendant; and

3. in the circumstances of the case could the plaintiffs rescind the contract and demand the return of the RM306,000 together with damages (cl. 7.3)?

The defendant, in no uncertain terms had canvassed that the agreement did not provide for rescission by the plaintiffs in the event of a breach of the contract by the defendant, though did concede in the affirmative to the second question. At a very late stage of the hearing, the defendant modified its stance and advanced the argument that as the intitulment of the action did not mention s. 56 of the Contract Act, the plaintiffs thus could not submit on the importation of law for purposes of rescission.

Having scrutinized cl. 12(b), I found the defendant's stance rather strange and contradictory, due to the relevant words in cl. 12(b), which read "... without prejudice to the other provisions of this agreement or any other rights and remedies as may be available to the purchaser (s) at law or in equity ...". On proper construction of this clause, it clearly meant that the plaintiffs had the additional right to resort to any law or right in equity, though outside the provisions of the agreement, for remedies. As nothing had been inserted in that clause or anywhere in the agreement that limited the scope of the remedies, by necessity the latter must include rescission. As those words of cl. 12(b) were provided for in the agreement, and the intitulment did make mention of that controversial agreement, though not specifically s. 56 of the Contract Act, the modified stance of the defendant still did not help its case. On those grounds I was more than satisfied that cl. 12(b) of the S&P did allow the plaintiffs the right of rescission, if they so wished, in the event of any failure by the defendant to deliver vacant possession.

If I might venture a step further, there was also no inhibiting provisions anywhere in the agreement that prevented the plaintiffs from adverting to any relevant law, common law, equity, written or otherwise for a right to rescind the contract in the event of any breaches as provided for under cl. 12(b). On the other hand, such inclusion of provisions to remove the effect and oust the protection of relevant laws may run foul of certain public policy, and in violation of the very purpose of such laws. If the defendant is permitted to do that, then any S&P may attempt to contract outside the relevant legislations governing housing developments eg, Housing Development (Control and Licensing) Act 1966 (Act 118), Housing Developers (Control & Licensing) Regulations 1989 (effective 1 April 1989) and the like, legislations meant to protect purchasers (*City Investment Sdn Bhd v. Koperasi Serbagana Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69).

Even if I were to err in my findings that the agreement did provide for rescission, but with the defendant's admission that such rescission was permissible if any contractual laws were contravened, and as I have neutralised the late modified view of the defendant, the next step to be undertaken was the identification of that contravened contractual law. Since time was provided for to be of the essence in the agreement, s. 56 of the Contracts Act 1950 therefore must take prominence in the current discussion. This provision in crystalline terms states that when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was at that time should be of the essence of the contract. As the defendant had failed to deliver vacant possession by 18 June 1998 (within 24 months from date of execution of the contract), bearing in mind that time was of the essence in the contract, the contract thus became voidable at the option of the plaintiffs.

Voidable contract means an agreement that is valid and enforceable by law at the option of one or more of the parties thereto, and in this case the plaintiffs, but not at the option of the other or others (s. 2(i)). This option of carrying on or invalidating the agreement by the innocent party, needless to say arises as a result of the failure of the one without that option, in this case the defendant, to perform the terms of the provisions of the agreement (*The Commercial Law of Malaysia,* Wu Min Aun and Beatrix Vohrah pp. 30 and 90).

Whether it was sheer defiance or enshrouded by some ulterior motive, even to-date the defendant have not made any attempts to physically deliver that certificate of fitness to the plaintiffs, so as to rectify the delay in its completion of the contract. With that attitude prevailing, and the written contract rendered voidable, the plaintiffs thus were statutorily entitled to rescind the contract, as additionally provided for by s. 34 of the Specific Relief Act 1950. The fact that the rescission was not made forthwith on the very day of 18 June 1998 must not be taken against the plaintiffs. It must be borne in mind that even the agreed defect liability period was to be 12 months, to begin after the expiry of 14 days from the date of the letter of delivery of vacant possession. During that lengthy defect liability period, if a fundamental breach were to be detected, the plaintiff might even have recourse to the remedy of rescission of the contract. That being so, by analogy a waiting period of 33 days, before the letter of rescission was sent was neither unreasonable nor may qualify as undue delay, construable as a waiving of the plaintiffs' rights to

rescind. It must be understood that the cause of action ie, the day the contractual duty was broken by the defendant commenced on 18 June 1998, and once the plaintiffs had handed the letter of rescission, the contract thus had become void (*Insun Development Sdn Bhd v. Azali b Bakar* [1996] 2 CLJ 753; *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666, *Loh Wai Lian v. SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1). Once it was void it had ceased to be enforceable. Even if the defendant were to succeed in obtaining the certificate of fitness within a reasonable period after that relevant date, it would already have been too late in the day.

Factually I had found that by the time vacant possession was due, the plaintiffs had already paid up everything that was required to be paid, in accordance with the S&P. This factor was denied by the defendant and had attempted to make much of a balance sum of money amounting to RM15,300, supposedly kept by the plaintiffs solicitor's firm as stakeholders of that money (and the last balance), I was unable to accept that argument as that firm was the common solicitor of the contending parties!

In the event the court were to declare that the defendant had breached the agreement, and the plaintiffs had rightfully rescinded the agreement, there was no difficulty faced by the court in identifying the sums of money to be returned, as they were easily identifiable. What the defendant would have to do was to return the sum of RM306,000, together with the interest, beginning from the date of the filing of the originating summons. Both parties thus would be returned to their respective pre-agreement position as none would be permitted to profit from any unconscionable enrichment. With the contending parties back to square one, the plaintiffs too would be deregistered as the registered owners of the impugned property in the event they had been hurriedly so registered earlier. With the contract now avoided, and as there was nothing in law or any business practice that prevented the defendant from reselling the impugned property at the current market price to recoup any losses if any, it thus could do that. As a rider, in the event the defendant was to incur any loss that was regretful, as it was the very cause of this long and painful affair.

After having perused the facts and law my orders were as follows:

i. I hereby declare that the defendant had breached the sale and purchase agreement dated 19 June 1996, and the plaintiffs had rightfully rescinded the agreement on 21 July 1998 by reason of that breach;

ii. that the defendant refund the plaintiffs all monies paid to them totalling RM306,000 as the purchase price of the impugned property and incidental charges of RM2,980;

iii. interest at the rate of 8% per annum on the judgment sum from the date of the filing of the originating summons to the date of full settlement;

iv. the plaintiffs be deregistered as the registered owners of the impugned property on full and final settlement of the adjudged sum; and

v. costs of this application.